

English First  
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Mr. Brad C. Deutsch  
Associate General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463  
[Internet@fec.gov](mailto:Internet@fec.gov)

Re: Comments on Notice 2005-10: Internet Communications

Dear Mr. Deutsch,

These comments are submitted in response to the Federal Election Commission's Notice of Proposed Rulemaking (hereinafter "NPRM") 2005-10 published at 70 Fed. Reg. 16967 (April 4, 2005), seeking comment on how the Commission should amend the rule defining "public communication" in 11 CFR 100.26, as mandated by *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) to include certain public communications taking place on the Internet.

The Commission also seeks comment on whether to extend the exception for news stories, commentaries and editorials to media activities that appear on the Internet and whether to extend the protections of certain volunteer activities to individuals.

**Interest of English First**

English First is a 501(c)(4) organization, incorporated to lobby Congress on official English and related issues. English First operates a web site, <http://www.englishfirst.org>, which includes a blog, "English First News and Notes," <http://www.englishfirst.org/blogger.html>. English First also operates an opt-in e-mail list.

English First accepts no political advertising on its web site. The organization's web site is updated by an employee who receives no additional compensation for his efforts. The server for the organization's web site is maintained by a third-party Internet hosting service.

The English First blog, "English First News and Notes" is updated by an employee who receives no additional compensation for his efforts. The organization's blog is maintained by a third-party Internet hosting service.

## General Observations

### **I. The final regulations adopted by the Commission should lean toward encouraging, rather than discouraging, discussion of federal candidates and federal campaign issues.**

The NPRM notes on page 16969 that “any changes to the underlying definition of “public communication” pertaining to the Internet would automatically apply to “generic campaign activity.”

It is striking that, given generally falling turnout by the potential electorate in recent federal elections, that the Commission would contemplate any policy which might have a negative impact upon free-speech rights with regard to political parties, political candidates and/or elections.

The problem with our elections is not too much information about political candidates but the difficulty in obtaining relevant information on a timely basis.

In the hours immediately after a presidential debate, some people are profoundly interested in learning about the accuracy or lack thereof of the statements made during that debate. Should English First be hesitant to send out an e-mail alert to its opt-in electronic mailing list pointing out that Candidate A was accurate, while Candidate B was not for fear of crossing the line between permissible and impermissible activity?

### **II. The final regulations adopted by the Commission should treat similar speech similarly, whether it appears in print, in the public square, radio, television or the Internet.**

The editor of a web site owned by the *New Republic*, a corporation which publishes a magazine on politics, should not be forced to worry as to whether a “web-only” article posted on its web site might be an illegal corporate contribution, while that same article, if printed word for word in the *New Republic*’s print edition would be First-Amendment-protected free speech.

There are also corporate-owned blogs which currently accept submissions from non-news media sources, such as knowledgeable conservative or liberal activists, private citizens and even elected officials. Examples include *National Review Online*’s “The Corner” [<http://www.nationalreview.com/thecorner/corner.asp>] and *TPMMemo Café* [<http://www.tpmcafe.com/>].

If an English First employee criticizes a federal candidate in a submission which is published on the *National Review* blog, “*The Corner*,” should English First fear it has somehow made a corporate contribution to that candidate, even though a *National Review* print reporter could elicit the identical quote from that same English First employee during a formal interview and print that quote in its print magazine with impunity?

Both the *National Review* blog and its print magazine should be considered First Amendment protected free speech. Furthermore, English First should be freely allowed to hyperlink to that quote in *National Review*'s blog from English First's own blog or web site, also on First Amendment grounds.

**III. There is no longer a clear bright line, if there ever was, between citizen and journalists, nor can such a line clearly differentiate between a web-only magazine like *Slate* [<http://www.slate.com>], a blog like *Captain's Quarters* [<http://www.captainsquartersblog.com/mt/>] and a web site run by a 501(c)(4) organization such as English First [<http://www.englishfirst.org/>].**

The Commission has been tasked by Congress with regulating election campaigns, not monitoring every computer in America to ensure that no impermissible discussion of political parties, issues or candidates occurs.

In 2004, there was robust political debate and discussion on the Internet that rivaled the offerings of the traditional news media. This discussion led to a healthy venting of all the facts surrounding political controversies. Much of this venting was led by civilian experts who otherwise might not be heard from. The Internet has enabled anyone with a computer and a few dollars for software to become an investigative reporter.

Even international bodies have found it difficult to create a sufficiently inclusive definition of the term "journalist." A short, accurate news article may require a few minutes or a few weeks of investigation and fact checking.

Should the Commission choose to aggressively apply campaign finance law to the Internet, the chilling effect of this action will be of Antarctic proportions.

### **Section by Section Comments by English First**

#### **Section I B. Internet Communications – Proposed 11 CFR 100.26**

The Commission asks if it should "amend its regulation to explicitly state that it is not including "bloggers" in the definition of public communication?"

Blogs as such took off after the 2000 election but prior to the 2004 election. English First is concerned that a specific exception for "bloggers" while the FEC maintains relative silence regarding other forms of Internet communication will guarantee an inbox full of complaints to the FEC the minute Internet technology changes.

One might say that the *Drudge Report* [<http://www.drudgereport.com/>], with its many links to news stories, was the first blog. Now blog sites engage in as least as much commentary as they do in hyperlinking.<sup>1</sup>

There are web sites like *NewsMax.com* [<http://newsmax.com/>], which run stories and accept advertising, that are at least the equivalent of their print counterparts in all but publishing expense. There are also sites, such as *FCFNews on Demand* [<http://www.fcfnewsondemand.org/>], which allow visitors to play audio files of interviews and statements by newsmakers of their choice, but contain little print text and no way to hyperlink to individual interviews.

A blanket exception for blogs which does not also protect other forms of web sites would be unduly restrictive of free speech and, frankly, fundamentally unfair to most Internet content providers.

A blog can constitute virtually the entirety of a web site, like <http://www.andrewsullivan.com> or merely one page among thousands stored on a large web site. It would seem strange for the Commission to allow a group like English First free rein on the one page of HTML code upon which its blog appears while strictly regulating the rest of its web site and reviewing its e-mails for impermissible activity.

The Commission seems convinced that web designers are eager to face costly litigation and substantial fines in order to say a few words which might cause others to look to their candidate of choice with favor. This view is incorrect. Just ask the people who set up web sites paying tribute to movie characters before receiving a “cease and desist” letter.

However, an Internet web site can be easily duplicated with or without the permission of the owner of the original site. Internet browsers, such as *Microsoft Explorer* and *Mozilla Firefox*, have a “reveal codes” function, allowing any web site to be duplicated by someone with a modicum of knowledge. Web site design products may even include prewritten code which means that a web site designer may create one site for a federal candidate which looks all but identical to a web site he created for something else.

The ability to ensure an informed electorate by detecting falsehoods would be decreased rather than increased should the Commission opt to create a “safe harbor” for web sites “if access to those sites is restricted to the restricted class of a corporation or labor organization, or to only the members of a membership organization.”

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<sup>1</sup> The issue of hyperlinks is likely to reoccur given the increasing use of HTML-enabled e-mail and blogs. If a blog run by a corporation that is not exempt from FEC regulations hyperlinks to an article carried on the web site of an exempt entity, say, *The New Republic*, has a violation occurred? An e-mail from a non-exempt corporation might include a similar hyperlink captioned “you may find this of interest.” Has that e-mail become an illegal corporate contribution? What about websites/e-mail lists like GOPUSA [<http://www.gopusa.com/>], a news service for conservatives, whose e-mails consist almost entirely of hyperlinks to articles of interest?

The English First web site includes links to web sites run by opponents of official English [<http://www.englishfirst.org/groups.htm>] for a reason. We want people to read our side and the other side and to see for themselves who has the better of the argument.

The public educational benefit of this approach, as opposed to allowing only English First members to access certain web site content, would seem obvious.

Some of the nastiest campaign accusations are made when the message can fly below the radar of opposition candidates and the news media. Sites which require costly memberships (or appear to do so) will discourage the kind of useful opposition research which ensures a certain minimum level of accuracy in federal elections.

A better approach than the Commission attempting to pick and choose between exempt and non-exempt uses of the Internet would be for the Commission to state that unless a web site is owned by a political candidate, political party or federal political action committee, its contents are entirely protected by the First Amendment

#### **Section IV. 11 CFR 110.11 – Communications; Advertising; Disclaimers**

The Commission correctly states that “with respect to most Internet Web sites and blogs, the burden of complying with a disclosure requirement, and the resources needed for the Commission to monitor such a requirement, could outweigh the value of disclosure.” This statement is correct.

The Internet thrives because people like to talk about their interests and people enjoy finding others who share their interests. Most web sites do not make money. Web sites run by organizations are usually an adjunct to the organization’s mission, not its only reason for being.

If someone wants to register an “ilovethegop.com” domain and fills it full of links and opinion, he should be applauded for taking an interest in the political process, not forced to fill out reams of government paperwork because a federal candidate bought an ad on his web site.

Any reader of the *Daily Kos* [<http://www.dailykos.com/>] knows it loves all things liberal. Candidates who purchase ads on this web site are not so much making an investment as they are saying to the audience for that web site, “I am one of you.”

While the potential of Internet fundraising has set federal candidates to drooling, there are relatively few who have the kind of national name recognition to exploit its potential. While a “Hillary Clinton for President” web site is likely to rake in the money, a “John Doe for Congress” web site is likely to be a campaign expense rather than a money tree.

#### **Section IV A. Scope of Disclosure Requirements**

The Commission's efforts to regulate unsolicited e-mail in any way will inevitably fonder. This is because the true spammers set up shop outside the jurisdiction of American law, just like the on-line gambling sites do.

Just because a given e-mail looks like it came from a friend or an organization does not mean that friend or organization was the actual source of the e-mail in question.

It is essential that the Commission this point: just because an e-mail is received, it may not have been sent with the consent of the sender, even if that e-mail was sent to thousands of people.

There are computer viruses which send copies of themselves to every e-mail list in address books, particularly addresses stored in Microsoft's Outlook Express. There are also "spoofers" who place a real e-mail return address that belongs to a third party on the spoofer's outgoing e-mail. English First was even the victim of political opponents who posted inflammatory messages in Internet user groups in order to generate attacks upon the organization's website and its organization. The old saying, "pictures do not lie" has ceased to apply in an age of Photoshop.

If the Commission suspects that attempting to monitor Internet web sites and blogs would needlessly consume its limited resources, such a suspicion should be multiplied many times over when the subject is e-mail.

E-mail lists are notoriously unreliable with an astounding number of bad addresses. Now that many Internet providers, like *AOL*, and e-mail reading software, whether offline like *Eudora* or *Pocomail*, or on-line like *Gmail*, have added anti-spam capability, the number of actually delivered e-mails is all but untrackable. Until the success of e-mail lists can be as relatively predictable as an acquired postal mailing list, commercial transactions of e-mail lists are likely to disappoint purchasers of such lists.

## **IX. 11 CFR 114.9—Use of Corporate or Labor Organization Facilities and Means of Transportation**

The Commission proposes the addition of "computer equipment and Internet Web sites" as "facilities" which may only be used for "campaign activity" on a basis that is "occasional, isolated, or incidental" and would apply that legal requirement even to employees on their own time at home so long as they were using a "corporate or labor organization's computer or Internet activity over the Internet or at locations outside of work."

Most e-mail users not only maintain an address book of contacts but special mailing lists. Some lists are immediate relatives and may include a handful of addresses. Other lists can include hundreds of names. An individual might be amused or annoyed by a statement made by Candidate A. He pastes the statement into an e-mail, adds some comments and sends it off to his private list.

Under this proposed regulation, if that individual used his company's computer, he has engaged in campaign activity, while if he used his personal computer he has not. The content of the e-mail is identical, but the Commission's interest has changed, based upon something exceedingly difficult to track.

E-mail technology is rapidly becoming a ubiquitous part of every portable electronic device. If the employee in question used his company-provided Blackberry, or other e-mail device to tell his address book, "Vote for John Kerry," would he now be of interest to the FEC?

### **Conclusion and Request to Testify**

English First is strongly opposed to efforts to reduce free speech on the Internet. English First is even more strenuously opposed to efforts to carve out exempt uses of the Internet based upon where a comment about a political candidate may appear or what computer was used to interact with the Internet.

FEC regulation of the Internet will force the Commission to concern itself with literal nickels and dimes as opposed to directing its scarce resources toward far more egregious violations of our nation's election laws. This is a road upon which it should not even begin to travel.

The Commission would do well to reaffirm its May 20, 2002 statement regarding its Internet policy rather than allow a single federal judge to overrule the best judgment of both Congress and the Commission.

In addition, I would be glad to formally testify on behalf of English First on these proposed regulations at your upcoming June 28-29 public hearing. I would gladly amplify upon any particular aspect of our comments that the Commission deems relevant to its deliberations.

Sincerely,

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